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IN THE

Supreme Court of the United States

October Term, 1948.

Nos. 226, 227, 243.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE COMPANY, et al.,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE, and FRANCIS BOEHM,

Respondents.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION, and CHRISTIAN A. JOHNSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, et al., THE HOME INSURANCE COMPANY, et al.,

Respondents.

BRIEF FOR THE HOME INSURANCE COMPANY AND TRADESMENS NATIONAL BANK AND TRUST COMPANY.

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OPINIONS BELOW.

The opinion and judgment of the Court of Appeals for the Third Circuit (R. 12), and the opinion denying petitions and cross-petitions for rehearing (R. 138) are

reported at 168 F. 2d 722 (C. A. 3, 1948). The opinion of the District Court is reported at 71 F. Supp. 797 (D. C. Del., 1947) (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported. They are set forth in the Commission's Holding Company Act Release Nos. 7041 (R. 25a) and 7119 (R. 128a).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835 (15 U. S. C. 79y). The judgment of the Court of Appeals for the Third Circuit was entered on March 19, 1948. Petitions and cross-petitions for rehearing were denied on June 11, 1948. The petition of The Home Insurance Company, et al. for a writ of certiorari was filed August 16, 1948, and granted on October 25, 1948.

INTEREST OF PETITIONERS.

The Home Insurance Company and five affiliated companies, namely, City of New York Insurance Company, National Liberty Insurance Company of America, The Homestead Fire Insurance Company, The New Brunswick Fire Insurance Company, and The Georgia Home Insurance Company, and Tradesmens National Bank and Trust Company, collectively, were the owners of 7400 shares (having a stated value of $740,000) of preferred stock of Engineers Public Service Company (Engineers). In June, 1946, Engineers consummated in part a plan pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935. Under the plan each of the petitioners received payment of $100. per share plus accrued dividends on account of its shares of preferred stock, and retained under the plan and accompanying escrow arrangement a claim for such additional amount as may ultimately be found payable on

its shares of preferred stock. On June 1, 1948, the four affiliates first above-named were merged into The Home Insurance Company as the surviving Corporation, and on June 30, 1948, The Home Insurance Company acquired by purchase the assets of the fifth affiliate, thereby succeeding to the surviving claims of the five affiliates as preferred stockholders of Engineers.

STATUTES INVOLVED.

The applicable provisions of the Public Utility Holding Company Act of 1935 and of Section 77 of the Bankruptcy Act are set forth in the Appendix hereto.

QUESTIONS PRESENTED.

Engineers, a solvent holding company registered under the Holding Company Act, filed a plan under Section 11 (e) of the Act providing for payment of cash amounts equal to the voluntary call prices of the several series of preferred stocks in exchange for the surrender of the preferred stocks. The plan also provided for the distribution of the remaining assets of Engineers to the common stockholders and the dissolution of Engineers. The Securities and Exchange Commission found the plan fair and equitable to all stockholders. In enforcement proceedings under Section 11 (e) the District Court found the plan inequitable and disapproved payment to the preferred stockholders of any amounts in excess of $100. per share plus accrued dividends, basing its finding in this respect on what the Court termed "colloquial equity." The Court of Appeals sustained the District Court in its disapproval of the plan, but held that the District Court erred in not remanding the case to the Commission for revaluation of the preferred stocks with due consideration for factors which the District Court found pertinent. The following questions are presented:

1. Is the charter involuntary liquidation preference of the preferred stocks controlling as a matter of law?

2. If the involuntary liquidation preference is not controlling as a matter of law, did the Commission properly apply the fair and equitable standards of Section 11 (e) of the Act in approving as part of a plan payment to preferred stockholders of cash equal to the current going concern values of their shares not exceeding the voluntary call prices therefor?

3. Where the Commission finds a plan filed under Section 11 (e) of the Act to be fair and equitable to the persons affected thereby and such finding is based on substantial evidence and has rational foundation in law, may a district court reject such finding on the basis of a discretionary weighing of equities, independent of and without regard for the generally recognized limitations upon the scope of judicial review of policy and fact finding functions of the administrative tribunal?

4. Is remand necessary under the circumstances of this case, and, if so, what are the guiding principles or criteria upon which reconsideration is to be based?

STATEMENT.

The net collective effect of the opinions and findings of the District Court and the Court of Appeals in this case is to take something of value from the preferred stockholders and give it to the common stockholders on the basis of irrelevant considerations and in violation of equitable principles already found by this Court to be applicable to reorganizations under Section 11 (e) of the Holding Company Act. While the Court of Appeals has ordered the case remanded to the Commission for reconsideration and revaluation of the preferred stocks, it has done so upon specifications which indicate that the amounts payable to the preferred stockholders under the plan must be scaled down by some amount, if not to the level of $100. per share reached by the District Court. Furthermore, the Court of Appeals has defined the respective roles of the Commission

and the District Court in proceedings under Section 11 (e) to be virtually co-ordinate in all areas of fact-finding, regardless of the special competence of the Commission in such areas and particularly in the area of valuation. So long as the District Court does not act capriciously, it may continue to reject valuations made by the Commission until it is satisfied. Thus the stage is set for an impasse in any situation where there may be reasonable differences of opinion in the selection and evaluation of facts.

In view of the shackling effect of these conclusions on the administrative process and the valuation methods of the Commission generally and particularly in this case, a history of the steps leading up to the present awkward situation and summaries of the related portions of the opinions of the two Courts are appropriate preludes to any appraisal of the Commission's findings.

The Plan and Its History.

At the inception of the proceedings under Section 11 (e) of the Act, Engineers had outstanding three series of cumulative preferred stocks of equal rank: 143,451 shares of $5 dividend series, callable at $105 per share; 183,406 shares of $5.50 dividend series and 65,098 shares of $6 dividend series, each callable at $110 per share.

Initially Engineers filed a plan providing for the satisfaction of the claims of its preferred stockholders in cash at the rate of $100 per share plus accrued dividends, distribution in kind of its remaining assets, which consisted principally of common stocks of operating utility companies, to the common stockholders, and dissolution of Engineers. Engineers then contended that the preferred stockholders were not entitled to anything more than the involuntary liquidation preference of $100 per share as a matter of law or equity, and provided separate machinery in the plan for resolving the question of any additional payment.

After hearing and argument, the Commission found the proposed payments to preferred stockholders inadequate and disapproved the plan. The Commission held that the involuntary liquidating preference of the charter was not controlling, and that the preferred stockholders were entitled to amounts equal to the voluntary redemption prices of the preferred stocks as representing the going concern values and equitable equivalents thereof. Thereupon Engineers, acting on the recommendation of its counsel (R. 1949a—Eng. Ex. 89, Int. R. 1291a), amended its plan to provide for the cash payment of these larger amounts to the preferred stockholders. In order to obtain the balance of cash needed to pay off the preferred stockholders, the amended plan provided that Engineers would distribute to its common stockholders negotiable purchase warrants for purchase of common stock of one of its operating subsidiaries and sell in the open market the shares not purchased under the warrants. At this stage two common stockholder groups (the respondents in Nos. 226, 227, and 243) appeared in opposition to the amended plan and carried on with the contentions previously advanced and then abandoned by the management of Engineers.

The Commission approved the amended plan as fair and equitable to all stockholders and at the request of Engineers applied to the District Court for enforcement of the plan. The District Court approved the plan, except for any allowance to preferred stockholders in excess of $100 per share and accrued dividends, and entered an order enforcing the plan as amended by it. Engineers deposited in escrow an amount sufficient to pay the difference between the call prices of the preferred stocks and $100 per share plus an interest allowance on any deferred payment, and the portion of the plan so approved was consummated, subject to reservation of the disputed issue.

Summary of the Opinion, Findings of Fact and Conclusions of Law of the District Court.

Chronologically the District Court (1) filed its opinion, (2) entered specific findings of fact and conclusions of law supplementing its opinion,[1] and (3) entered its order disapproving payment to the preferred stockholders of anything in excess of $100 per share plus accrued dividends and enforcing the plan with that limitation (R. 2a, 3a). The Court expressly adopted as its findings of fact and conclusions of law the findings and conclusions of the Commission (R. 25a, 128a), except insofar as such findings and conclusions relate to or bear upon the allowance or payment to the preferred stockholders of any amounts in excess of $100 per share and accrued dividends and are inconsistent with the opinion or any of the other findings or conclusions of the Court filed with its order (R. 320a).

The rationale of the opinion is as follows: (1) under Section 11 (e) a district court has the affirmative duty to determine whether a plan approved by the Commission is fair and equitable; (2) the quantum of participation of various security holders is determined by application of

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[1] These findings and conclusions were prepared in the first instance by the common stockholders and present an approach substantially different from the approach in the opinion. In the opinion the Court used certain off-setting factors to scale down the going concern values found by the Commission, whereas in the subsequent findings the Court started with the premise that payment of the maximum amount originally contributed by the preferred stockholders or their predecessors, without deduction for any underwriting expenses or discount (approximately $100 per share), is fair and equitable, and then held that there were no special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, which would create any equitable circumstances warranting payment to the preferred stockholders of amounts in excess of $100. per share plus accrued dividends (R. 316a).

fair and equitable standards to particular fact situations; (3) the amount payable to preferred stockholders on an involuntary liquidation terminating the holding company enterprise is only one of several factors in determining the relative rights of security holders[2]—the inquiry is one of relative rights based on "colloquial equity"; (4) while the Court accepts the present values for the preferred stocks for the three series as given by Dr. Badger, an expert witness, these values are not controlling because the plan itself does not propose to give these amounts to the preferred stockholders[3] and this factor is offset by other factors, namely: (a) Engineers received less than $100 per share for the preferred stocks, (b) the market history of the preferred stocks shows an average price much below $100 per share, (c) in order to comply with the Act, many assets of Engineers were sold for less than the carrying value on Engineers' books and many of the securities thus disposed of subsequently increased in market value and capitalized earning power greatly in excess of amounts realized by Engineers, (d) the retention of earnings applicable to common stock, that is, earnings in excess of preferred dividend

[2] While the Court favored this view and proposed to follow it in this case, it refrained from deciding the point and in practice appears to have given the charter provision considerable if not controlling weight. For discussion see Point 1 (a), *infra*, pp. 22, 23.

[3] Dr. Badger's opinion is that, absent the call feature, the preferreds would be worth per share $130.33, $119.57, and $108.70, respectively, for the $6, $5.50, and $5 series, which represent a 4.6% capitalization of the dividend rates, and that with the call feature, the preferreds have fair investment values of $111.50, $111.38, and $106.25, the small excess over the corresponding call prices of $110, $110, and $105 being allowed for the time required to effect a call. (R. 2118a—Pfd. St. Ex. 29-A, Int. R. 1205a). The Commission cut the fair investment values down to the exact equivalent of the call prices and the amended plan adopted the Commission's values.

requirements, is one of the reasons the preferred stocks are able to be evaluated at more than their redemption prices, (c) payment of $100 per share plus accrued dividends will give the preferred stockholders every dollar which the common contracted to pay them, approximately $190 ($100 per share plus dividends from date of issue) for every $100 which they or their predecessors initially invested in the enterprise, and the present preferred stockholders are not entitled to additional compensation for the termination of a "lucrative" dividend rate which the preferred stockholders have received and which is presently "excessive"; and (5) the payment of anything in excess of $100 per share plus dividends would not satisfy fair and equitable standards "by a wide margin" (R. 287a).

The opinion was supplemented and amended in certain particulars by fifty-four findings of fact and nine conclusions of law. The conclusions of law (R. 315a) do not materially alter the position of the Court as stated in its opinion, except for the reversal of the approach noted above (p. 7, footnote 1). The findings of fact (R. 294a) are in some instances actually conclusions of law. They are grouped according to purpose and content under captions as follows:

Nos. 1-2. *Procedural Facts* (R. 294a).

Nos. 3-16. *Background.* These findings are designed to show that the diversified enterprise represented by Engineers will be completely terminated by the plan and that the dissolution of Engineers and retirement of the preferred stocks are directly and wholly the consequence of the frustration accomplished by the Act and orders thereunder (R. 294a-295a). They underlie conclusions of law Nos. 1 to 4.

Nos. 17-21. *Charter Provisions.* These findings paraphrase the related charter provisions and state that Engineers has not called and redeemed, and does not propose to call and redeem, its preferred stocks; that the proposed

payments to the preferred stockholders are not payments in voluntary dissolution or reduction of capital, but result from the Act and the Commission's orders, which in turn effect a governmental frustration of the enterprise (R. 299a-300a). They underlie conclusions of law Nos. 4, 5, and 8, and may be used by the common stockholders as the basis for argument that the proposed liquidation is an involuntary liquidation within the meaning of the charter, although the Court avoided any conclusions of fact or law in this respect (No. 9, R. 317a).

Nos. 22-26. *Issuance and Sale of Preferred Stocks and Market History thereof.* These findings set forth the issue prices, underwriting costs, market prices, and dividend record of the preferred stock. The Court qualifies its findings on market prices by stating in effect that market prices in the early period (1928-1938) must be considered in the light of the warrants and conversion features of the preferred, and in recent years (1939-1944) in the light of the extensive market purchases of preferred by Engineers and other extrinsic factors such as the Commission's American Power & Light debenture decision (Holding Company Act Release No. 6176, — S. E. C. — 1945) wherein premiums were awarded senior security holders for the first time. The Court does not define the other extrinsic factors to be considered nor evaluate their effective candlepower for the student of colloquial equity (R. 301a-303a). These findings presumably underlie conclusions of law Nos. 5, 7, and 8.

Nos. 27-29. *Market Purchases by Engineers of Preferred Stocks and Commission's Restrictions with Respect thereto.* These findings show that Engineers purchased about 12,000 shares of its preferred stocks in the open market in 1939 and 1941 at prices ranging from $69 to $87¾ per share; that in 1943, when the preferreds were selling within a price range of $61-$74 per share, the Commission denied Engineers permission to purchase 35,000 shares of preferred; and that in 1944, when the preferreds

were selling in the nineties, the Commission authorized Engineers to use $4,000,000 for purchase of preferreds and Engineers purchased 25,560 shares at an average price of $99. The Court states that the Commission's reason for the 1943 refusal was the necessity for Engineers to file a comprehensive plan to satisfy Section 11 (b), and also cites the view of Commissioner Healy in a concurring opinion that a reduction of capital would take place within the meaning of the charter provision for involuntary reduction of capital, inferring (the Court says) that the preferred stockholders were entitled to the involuntary liquidating price of $100 per share plus accrued dividends (No. 27). The Court also cites the Commission's statement that purchases in 1944 under the circumstances, (one circumstance being that the preferreds were selling close to $100 per share) would not be unfair to the "security holders" of Engineers. These market purchases benefited both preferred and common stockholders (R. 303a-305a). The relation of these findings regarding prior Commission action to any particular conclusion of law is not apparent unless they constitute some of the factors which the Court found relevant and impelling in its conclusion No. 7.

Nos. 30-36. *Market and Dividend History of the Common Stock.* These findings set forth the net issue prices, market prices, and dividend record of the common stock; statistics regarding the amount of earnings retained in the enterprise, free earned surpluses, and effect of such retention on the financial position (R. 305a-307a). The findings on retained earnings are integrated in the Court's "colloquial equity" (R. 291a) and presumably underlie conclusions of law Nos. 5, 7 and 8.

Nos. 37-38. *Losses Sustained by Engineers in Making Divestments.* Here the Court finds that Engineers sustained substantial losses on many of the properties sold in compliance with divestment orders; that the losses were caused by the Act; and that the brunt of the losses has

fallen, and necessarily must fall, upon the residual claimants, the common stockholders, because "the preferred stockholders have received their dividends . . . at the full rate contracted for and are now to receive the full principal amount to which they are entitled." The Court also finds, by taking judicial notice of subsequent increases in the earnings of Puget Sound Power & Light Company, that the earnings estimated by the Commission for reorganization purposes and the increases in market prices for utility common stocks subsequent to 1944 make it plain that Engineers investment in Puget Sound came to have a realizable cash value substantially higher than the amount realized. The Court states that substantial book losses were also sustained on other sales, some but not all of which are designated (R. 307a-308a). These findings are a little more specific than the general finding of losses in the Opinion (R. 290a) and enter into the "colloquial equity." Presumably they also underlie conclusions of law Nos. 5, 7, and 8.

Nos. 39-40. *Additional Contributions to Be Made by Common Stockholders to Carry Out Plan.* The Court recognizes the conceded fact that Engineers needed about $26,000,000 to carry out the plan and proposed to raise $22,000,000 through the sale of common stock of Gulf States Utilities Company and $3,800,000 by advance dividends from subsidiaries payable on condition that no further dividends may be paid by the subsidiaries for certain specified periods, the longest of which ends June 15, 1948. The Court finds that the plan requires that common stockholders make up this deficiency ($26,000,000) and undergo the risk of possible declining markets.[3] The Court also found that, if its decision is sustained on appeal, the escrow fund will go to the common stockholders, less interest that might have been

[3] This is not correct. The plan provided that common stockholders could exercise their purchase warrants or sell them as they saw fit (R. 105a-107a).

earned and all fees and expenses incurred in the present litigation (R. 308a-310a). No relation of these findings to any of the conclusions of law is discernable.

Nos. 41-54. *Evidence as to "Present Investment Value of the Preferred Stock."* It is difficult to present a summary of these findings. They include principally excerpts from the testimony of Dr. Badger and citations of facts, some outside the record, and arguments in an effort to discredit his opinion on the fair investment values of the preferred stocks. The Court states that the record establishes that as of the time of Badger's testimony his investment values do not represent investment values of the preferred stocks in the past and are not determinative of the investment values thereof for any considerable period of time in the future; that there are many factors of a potentially adverse character and the extent to which the investment value of preferred stocks of the character of those here involved can decline is very great. The Court states that the extremely low money rates currently affecting investment values reflect artificial factors which are clearly subject to changes at any time and may be purely transitory (R. 310a-315a). Since the Court accepted Dr. Badger's values, assumed them to be applicable at the time, May 15, 1947, in the absence of a showing of changed circumstances (R. 290a), filed its findings of fact on May 29, 1947, and directed these findings at the potential for future change, the role, if any, of these findings in the conclusions of law is not discernable.

It should be noted that the Court did not find as a matter of fact or law that a liquidation brought about by Section 11 (b) is the kind of involuntary liquidation which the parties had in mind when the charter provision regarding involuntary liquidation was adopted in 1925.

It is not possible to discover from the Court's opinion, findings of fact and conclusions of law the extent to which the several factors deemed relevant by the Court entered

into its ultimate conclusion or how such factors were evaluated. The composite effect was to absorb exactly the excess of the going concern value of the preferred stocks over the involuntary liquidating preference of $100 per share plus accrued dividends, regardless of the differences in dividend rates and call prices of the three series. These differing basic factors presumably weigh exactly the same on the scales of colloquial equity.

Summary of Opinion of the Court of Appeals.

The gist of the opinion is that a district court in a proceeding under Section 11 (e) must exercise its independent plenary judgment as an equity reorganization tribunal in every matter relating to the fairness and equity of the plan; the court is not bound by the findings and conclusions of the Commission as an administrative tribunal, and while a district court may not substitute its valuations for those of the Commission, it may reject valuations even though based on substantial evidence; in this case the District Court Judge weighed the numerous elements involved in the case on his own scales, and in the exercise of his independent judgment, arrived at the conclusion that the plan was not fair and equitable; the charter provisions regarding involuntary liquidation are not dispositive of the issues presented (*Otis & Co. v. S. E. C.*, 323 U. S. 624, 637); the weight and emphasis applied by the District Court and the Commission to the various factors in the case go to two primary considerations on which the two tribunals differed, namely, (1) the Commission did not determine and apportion the earning power of the enterprise between the preferred and common stocks based on their respective claims as it did in the *United Light & Power Company* case (*Otis & Co. v. S. E. C.*, 323 U. S. 624), and (2) the Commission failed to consider and give effect to losses said to have been sustained by Engineers on previous divestitures compelled by the Act; conceivably under certain circumstances investment value could be the

equitable equivalent to the security holder, but the Commission has not made such a finding in this case and the Court does not believe that such a finding could be supported on the present record; the Commission must consider and weigh all pertinent factors and all substantial equities whether equitable equivalents are to be reached by an approach *ex* or *intra* the Act; the *new* doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the Otis case; the District Court did not err in disapproving the payments to the preferred stockholders, or at least its conclusion was not clearly erroneous; however, the District Court cannot amend the plan and enforce it and the record should have been remanded to the Commission for further and appropriate action; the problem is and will remain, until its disposition by the Commission, one of valuation of the securities, viz., the preferred and common stocks. (R. 13, particularly R. 33-40)

In passing the Court of Appeals recognized that its conclusion as to the function of a district court and the scope of review in proceedings under Section 11 (e) conflicts with decisions in other circuits, citing *Lahti v. New England Power Ass'n.*, 160 F. 2d 845, 858 (C. A. 1, 1947), and *Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 151 F. 2d 424, 430 (C. A. 8, 1945), affirming *In re Laclede Gas Light Co.*, 57 F. Supp. 997, 1004 (D. C. Mo. E. D., 1944), cert. denied 327 U. S. 795. It distinguished its own decision in *In re Standard Gas & Electric Co.*, 151 F. 2d 326 (C. A. 3, 1945), cert. denied 327 U. S. 796, by saying the question here presented was not in focus in that case. (R. 31-32)

Assuming then, as we contend and the Commission and Court of Appeals have agreed,[4] that the involuntary liquidation preference prescribed by the charter is not controlling, the present dispute centers mainly on the difference in the standards and concepts of relevance applied by

[4] For the position of the District Court see Footnote 2, *supra*, p. 8, and the discussion under Point 1 (a), *infra*, pp. 22, 23.

the Commission on the one hand and the District Court on the other hand, with the Court of Appeals upholding the District Court in this respect apparently on the theory that it must do so if the conclusions of the District Court are not clearly erroneous. The indications are that the Commission must in some undefined way satisfy the District Court in terms of colloquial equity, and in the process weigh the losses and find a dollar value for the common stock if the valuation is to be made under the doctrine of the Otis case (R. 37).

The ultimate questions, therefore, are whether the factors which influenced the District Court to reduce the payments are relevant, whether the Courts are correct in holding or indicating that the Commission failed to consider any relevant factors or give them due weight, and finally, whether the District Court was justified in rejecting the Commission's valuation.

Summary of the Findings and Opinion of the Commission.

The findings and opinion are contained in two documents: (1) Release No. 7041, dealing with the original plan and entered December 4, 1946 (R. 25a-101a); and Release No. 7119 dealing with the amended plan and entered January 8, 1947 (R. 128a-141a).

The second release adds nothing of importance to the issues on appeal except for the findings that the amended plan removes the features in the original plan which the Commission found objectionable, that the objections to the treatment of the preferred stocks being advanced by the common stockholders was zealously presented by the company (as it was), and that the Commission saw no reason to change its previous findings (R. 133a-135a). Also Hanrahan, C., in a concurring opinion, held that the action of Engineers constituted a voluntary call, entitling the preferred stockholders to the call prices (R. 140a-141a).

In its first release, the Commission furnishes a description of Engineers' system, including plant, capital, as-

set and liability position, and earnings; the prior proceedings, including prior purchases by Engineers of its preferred stocks; and a description of the plan. The Commission found the plan necessary insofar as it provides for the disposition of El Paso Electric Company and Gulf States Utilities Company, and dissolution of Engineers, but objected to certain mechanics which would result in substantial delay in effecting compliance with the Act.

The important findings relate to the fairness of the plan (R. 59a-73a). The Commission found that the preferred stock, instead of providing valuable leverage for the common, had become a financial burden; the company had accumulated from previous property dispositions and retained earnings a large reserve of idle cash, which was yielding no return, and ordinarily a company in that position would voluntarily redeem the preferred; while the proposed dissolution was due to the Act, the preferred claim would not thereby be matured and the charter provision would not be controlling; the security holder must receive, in the order of his priority, the equitable equivalent of the rights surrendered. Consideration was then given to the applicable charter specifications, the issue prices, the dividend record, the corporate and consolidated capitalization and surplus, the market history, the earnings available for preferred dividends from 1937 to 1945, the testimony of Dr. R. A. Badger, an expert witness, and D. C. Barnes, president of Engineers, on the many economic and market factors bearing on the value of the preferred stocks. The Commission noted that the sale of Puget Sound Power and Light Company in 1943 and 1944 strengthened the earnings of the company. It noted that Badger and Engineers concurred in the view that the values or investment worths of the preferred stocks, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities, exceeded the call prices. The previous losses were considered and held irrelevant. The contention that the preferred stockholders should

share the losses was rejected as was the contention that the payment of anything in excess of $100. per share would be a windfall for the preferred stockholders.

In conclusion the Commission found that fair and equitable treatment to the preferred stockholders would require the payment of amounts equal to the call prices as representative of present value of the preferreds on a going concern basis, and that such treatment would also be fair to the common stockholders. Thus it clearly appears that the Commission regarded these investment values as the equitable equivalents of the preferred stocks and was not substituting a new doctrine for that of the Otis case as the Court of Appeals concluded.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In holding that the Commission did not apply proper standards and techniques and failed to consider and weigh all the relevant factors in its valuation of the preferred stocks.

2. In holding that the District Court may reject the findings of fact and valuations of the Commission based on substantial evidence without regard for and independent of the generally recognized limitations upon the scope of judicial review of policy and fact finding functions of the administrative tribunal.

3. In not reversing the order of the District Court insofar as it disapproved payment to the preferred stockholders of the additional amounts provided in the plan and in not directing the District Court to approve such payment in accordance with the provisions of the escrow agreement.

4. If remand was proper, in not furnishing to the Commission principles or criteria for determining the weight to be given to the colloquial equities.

OUTLINE OF ARGUMENT.

Our contentions on this appeal are:

(1) The Commission properly applied the fair and equitable standards of Section 11 (e); valuation of the preferred stocks on a going concern basis with full priority was proper; and the Commission's valuations of the preferred stock are based on the consideration and weighing of all relevant factors,

(2) The Court of Appeals erred in holding that the District Court may reject valuations of the Commission based on consideration of all relevant factors and supported by substantial evidence,

(3) Assuming that the involuntary liquidation preference in the charter is not controlling as a matter of law, the findings of the Commission are binding on the District Court, and there is no basis for remand to the Commission.

Argument.

PREFACE.

At the time of consummation of the plan in June, 1947, the preferred stocks were valuable securities carrying dividend rates ranging from $5. per share to $6. per share and call prices ranging from $105. per share and $110. per share. They had been selling in the market at prices close to their call prices (R. 1391a-1393a, Eng. Exs. Nos. 26, 27, 28, Int. R. 463a-464a), and it was conceded that they would sell slightly above the call prices were it not for the Holding Company Act and these proceedings (R. 522a, 658a-663a). It was also conceded that the present value or investment worth of the preferreds, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities, was in excess of the respective call prices (R. 67a, 1211a, 1953a). An expert witness, Dr. Badger, testified that a proper yield for the preferreds, absent a call price, would be 4.6% and that on the basis of quality and yield, the values for the three series would be $108.70, $119.57, and $130.33 respectively (R. 2118a). The Commission as an expert tribunal found that under such circumstances and were it not for the Act, a company would ordinarily redeem the preferred stocks (R. 60a), and that the investment or going concern values were at least equal to the call prices (R. 67a-68a). These findings are supported by substantial evidence and are undisputed.

The District Court would deny the preferred stockholders compensation in excess of the involuntary liquidation preference of $100. per share, although that contract provision is not controlling, and the Court of Appeals, while not affirming the District Court's valuation, has told the Commission to try again to satisfy the District Court under ground rules which give to the District Court a continuing right of veto so long as it does not act capriciously and is not clearly erroneous in its conclusions. Questions

of relevance, weight and emphasis are involved. On this basis the preferred stockholders can only win if they obtain the unanimous vote of two tribunals on the facts. The special competence of the Commission in the area of valuation is subordinated to some permissible margin of error in the District Court. This contrasts strangely with the stature of findings of the Commission on direct appeal to the Court of Appeals under Section 24 (a), in which case the Court would be bound by the findings of fact by the Commission if based on substantial evidence.

Consequences so unusual, so contradictory, so burdensome, suggest error. The errors are readily discernible. We do not mean to rest the case for the preferred stockholders solely on the doctrine of administrative finality in the area of fact-finding. We contend that the District Court's rejection of the findings of the Commission was based on non-relevant factors and that all relevant factors were properly considered and weighed by the Commission. But we also contend that when all relevant factors have been considered and weighed by the Commission and the statutory standards have been applied in a proceeding under Section 11 (e), the findings of the Commission should not be rejected because the District Court differs with the Commission as to weight and emphasis.

POINT 1.

THE COMMISSION PROPERLY APPLIED THE FAIR AND EQUITABLE STANDARDS OF SECTION 11 (e).

(a) Valuation of the Preferred Stocks on a Going Concern Basis With Full Priority Was Proper.

Basic to this proposition are the questions whether the involuntary liquidation preference in the charter is controlling as a matter of law, and if not, on what basis should the preferred stocks be valued.

The Commission undertook to value the bundles of rights represented by the preferred stocks as senior securities of equal rank, entitled to priority over the common stock. The valuations were intended to be as of the time the preferred stockholders were compelled to surrender their stocks. It valued the preferreds in relation to the enterprise at a going concern and with regard for current yields on investments of comparable risk. It treated the involuntary liquidation preference as a factor to be considered but not a controlling one.

This procedure is fully authorized by the decision in *Otis & Co. v. S. E. C.*, 323 U. S. 624, wherein this Court held that the power to simplify corporate structures under Section 11 of the Act does not mature rights; that on dissolution pursuant to the Act, the rights of stockholders of a solvent company may be evaluated on the basis of a going concern and not as though a liquidation were taking place; and that full priority shall be accorded classes of securities according to their contractual preferences. In view of the comprehensive discussion of this question in the brief filed by the Commission in its appeal (No. 226), we will not argue this legal proposition further in this brief, and instead will direct the attention of the Court to some important departures from these principles by the District Court and the Court of Appeals.

The District Court at first seems to have agreed that the charter provision was not controlling. It expressed the thought that the rule in the *Otis* case applies, and stated that it preferred to consider the charter provision as one of several factors in determining the relative rights of the various security holders (R. 288a, including footnote 2). Later, however, the Court stated that it had reached no conclusion on the point, that in any event the preferred stockholders are not entitled to receive any amount in excess of $100 per share plus accrued dividends on the basis of all relevant considerations, and that the charter provision, if taken into account, constitutes an additional factor

supporting the conclusions reached (R. 317a, Conclusion of Law 9). When, however, the Court embraced "colloquial equity" and weighed the equities as it conceived them, the involuntary liquidation preference appears to have become a ceiling for the compensation to the preferred stockholders or at least a major premise underlying Court's rejection of the findings of the Commission. Subsequently, the Court cited its decision in this case for the proposition that the charter provision is not controlling. *In re Cities Service Company*, 71 F. Supp. 1003 (D. C. Del. 1947).

Initially the District Court accepted the investment values of Dr. Badger and, in the absence of a showing of changed circumstances, assumed that they were applicable at the time the opinion was filed, May 15, 1947 (R. 290a). The Court, however, turned its back on these accepted values and held that they were not controlling because the plan did not propose to give these amounts to the preferreds (R. 290a). This does not appear a valid reason for departure since the plan did rely on the investment values as a basis for paying the call prices for the preferreds in accordance with the finding of the Commission. The high level of the investment values represented the underlying strength of the preferreds and their capacity to absorb adverse market conditions or increases in money rates.

The District Court gave another reason of great significance. It held (R. 291a) that "fairness and equity do not require that the preferred stockholders be paid an additional $3,200,000. for the theoretical future deprivation of their present excessive dividend rate, for in each case the inquiry is one of relative rights based on colloquial equity. In short, there is no reason why the preferreds should get additional compensation for the termination of the lucrative dividend rate which the preferreds have received, when this termination results wholly and directly from frustration of the enterprise by governmental edict." This can only mean that the dividend rates are high in relation to the

rates on other preferred stocks of comparable quality and to money rates generally. The Court used the current low money rates to challenge both the fairness of the preferred contracts and valuations related to them. Thus at the outset, "excessive dividend rates" in relation to low money rates and frustration of the enterprise became basic reasons for rejecting the valuations of the Commission. Thereafter the Court viewed the problem primarily as one involving "payment of a premium" (R. 288a-291a), and forthwith decided that no premium should be paid. The Court characterized the payment of a premium as "comparable to dealing cards off the top of the deck" (R. 291a). Having disavowed any priority for the preferred stocks, the Court then fell back on the gross amount received by Engineers on the original issue of its preferred stocks, viz. $100 per share, as the maximum to which the preferred stockholders are entitled (R. 289a). Since each series will be paid the same amount regardless of differences in dividend rates and call prices, it is clear that the Court was not valuing the preferred contracts in relation to asset position or earning power of the enterprise.

The Court of Appeals clearly held that the involuntary liquidation provision was not controlling and to this extent followed the Otis case (R. 34). It credited both the Commission and the District Court with having treated the charter provision as but one factor to be employed in determining the values of the preferreds (R. 34-35), overlooking the substantial effect given by the District Court to the involuntary preference through the method or approach actually used by that Court.[5]

Also, when the Court of Appeals upheld the disapproval of the District Court as not being clearly erroneous, it too abandoned the doctrine of strict priority and in effect directed the Court to give consideration and weight to factors adverse to the senior position of the preferreds.

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[5] See discussion on this point *supra*, pp. 22, 23.

What both Courts overlook is the fundamental nature of the common stock. They seem to approach the problem as if the plan involved recapitalization on the basis of a single class of common stock, whereas the objective of the plan according to the testimony of D. C. Barnes, President of Engineers, was to "preserve, as far as possible, the interests of the common stockholders in companies in which they choose to invest, leaving to them the decision as to when and if they should sell their interest. One-stock plans were considered and rejected because of the conclusion that the inevitable changes in future market values would make whatever allocation was adopted ultimately inequitable to one class or the other" (R. 627a). He believed that the management should make it possible for the common stockholders through the medium of an appropriate plan to continue their investment if they desired to do so (R. 627a). (See also R. 719a, 723a, 807a.) This was accomplished under the present plan by retiring the preferred stocks for cash and handing over to the common stockholders the Company's interest in its operating utilities. Instead of continuing to share this earning power with the preferred stockholders, the common stockholders sought to retain it for themselves on as favorable basis as they could. This was accomplished in part by company purchases of preferred stocks in the market with the cash obtained from sales of properties (R. 38a-40a), and finally by retirement of the preferred stocks under the plan. The management was willing to compensate the preferred stockholders in the amounts found equitable by the Commission to gain this advantage for the common stockholders.

The situation is comparable to the experience in *In re Standard Gas & Electric Co.*, 59 F. Supp. 274 (D. C. Del. 1945), reversed and remanded in *In re Standard Gas & Electric Co.*, 151 F. 2d 326 (C. A. 3, 1945). There, in proceedings under Section 11 (e), a plan was approved for the satisfaction of notes at par by payment partly in cash and partly by distribution of portfolio stocks in subsidiary companies. Subsequent to approval and before consumma-

tion of the plan, the portfolio stocks appreciated in value to such an extent that the company was permitted to abandon the plan and redeem the notes at voluntary call prices in excess of par. *In re Standard Gas & Electric Co.*, 63 F. Supp. 876 (D. C. Del. 1945).

In the Engineers case the combined portfolio strength as expressed in terms of senior stocks was recognized by the Commission at the outset, and the company acquiesced in payment of amounts equal to the call prices because it saw benefit to the common stockholders in so doing just as did the management of Standard Gas & Electric Company when it abandoned its plan and decided to redeem its notes. Certainly in the application of the fair and equitable standards under Section 11 (e), there is no substantial difference between filing a plan which provides for compensation of preferred stockholders at values equal to call prices as representing the equitable equivalent of senior participation in the enterprise and a voluntary exercise of a call for redemption. Under the doctrine of the Otis case, a voluntary call for redemption could not be permitted if the call price exceeded the equitable equivalent of the bundle of rights of the security being redeemed. In one way or another the senior security holders are compensated according to their priorities.

(b) The Commission's Valuations of the Preferred Stock Are Based on the Consideration and Weighing of All Relevant Factors.

The Court of Appeals' criticisms of the findings and procedures of the Commission are as follows: (1) while the selection of techniques is for the Commission in the exercise of its expert administrative judgment and it may properly approach the problem of valuation either *ex* or *intra* the Act, the Commission must employ the chosen technique, scales and measures consistently throughout the entire operation of valuation with a full view of all the pertinent fac-

tors, which it did not do (R. 37); (2) a valuation *ex* the Act requires valuation of both the preferred and common stocks based on future earning power and apportionment of earning power to the two classes of stock as was done in the *Otis* case (R. 35); (3) in any valuation *ex* the Act, losses realized on divestments compelled by the Act must be weighed in the calculation—"returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping" (R. 37); (4) investment value is and can be only one of a series of factors to be used in arriving at equitable equivalents, and while conceivably investment value could be the equitable equivalent, the Commission has not made such a finding and the Court believes no such finding could be supported on the present record (R. 38).

Beyond the four elements just mentioned, the critical import of the opinion is not clear. The Court finds that the weight and emphasis applied by the District Court go to the two primary criticisms described in clauses (2) and (3) of the preceding paragraph (R. 35); and that the District Court made a "cogent finding respecting Dr. Badger's use of interest rates as an aid in fixing the valuations for the preferred deeming the interest rate used by the latter to be too low" (R. 19). Our study of the opinion reveals no other appraisal of the relevance of the various factors which entered into the "colloquial equity" or influenced the District Court in reaching its decision. One can only presume that the lack of clear error on the part of the District Court applies to the influencing factors as well as the result.

As stated above, we contend that the factors influencing the District Court in rejecting the valuations of the Commission and the factors influencing the Court of Appeals to remand for revaluation are inapplicable as a matter of law. Inapplicability turns on consideration of undisputed facts. As a beginning, we refer to the Summary of the Findings and Opinion of the Commission appearing at pages 16 to

18 in this brief for an enumeration of the many factors considered and weighed by the Commission in reaching its conclusions. The sufficiency of the evidence to support the findings of the Commission cannot be fairly disputed. We are here concerned with questions of relevance and emphasis, and, as we see it, a misconception by the Court of Appeals of the techniques employed by the Commission.

Valuation of Common Stock. The Court of Appeals holds that under the doctrine of the *Otis* case, the Commission is bound to value the entire enterprise in terms of some common denominator and then apportion that value between the preferred and common stockholders. It is difficult to see wherein such a procedure would lead to any different result in this case. There would still be the problem of compensating the preferred stockholders for their senior position in the assets and earning power. Whatever the economic strength of the senior position may be, it is nevertheless subject to the voluntary call factor, and the wisdom of imposing a ceiling on the high intrinsic values at the call price level is amply demonstrated in the experience in the *Standard Gas & Electric Company* case where the call was voluntarily exercised for the benefit of the common stockholders (*supra*, p. 26). Under these circumstances the valuation of the preferred necessarily resulted in a valuation of the common, and the Commission expressly found that the allocation of the residual assets to the common stockholders was fair and equitable.

Future Earnings. In the *Otis* case, the problems were to determine what kind of a capital structure the earning power of the enterprise would support and whether the earning power was sufficient to cover the annual dividends and dividend arrearages of the preferred stocks and leave some earning power for allocation to the common stockholders. While estimates of earnings are helpful, they are no substitute for demonstrated earning power. Here the Commission did determine earning power in terms of the

coverage of the annual dividends on the preferred stocks in the light of the risk factor. What is more important, the common stockholders could and would have refunded the preferred stocks at a much lower rate and improve their own earning power.

Low Money Rates. As previously pointed out, the District Court considered the preferred stockholders as enjoying "excessive dividend rates" and this characterization was necessarily related to the current low money rates (*supra*, pp. 23, 24). It was not related to any weakness in the earning power of the enterprise. This "equity" apparently influenced the District Court in turning away from a valuation of the preferred stock contracts. Although the District Court accepted the investment values as found by Dr. Badger, in the absence of a showing of changed circumstances, and therefore necessarily accepted the valuations made by the Commission, the Court of Appeals interprets the finding of the District Court to mean that Dr. Badger used too low an interest rate in fixing his values for the preferred stocks (R. 19, n. 9). All that the District Court found in substance was that there are some artificial factors in the current money rates and that the rates are subject to change. The important fact is that there could be a substantial increase in the then current money rates without affecting the market value or intrinsic value of preferred stocks entitled to sell on a 4.6% yield basis. Furthermore the Commission was dealing with a valuation as of the time the preferred stockholders were compelled to surrender their claims. While undoubtedly the District Court is entitled to change its mind, one is reminded that in the *Standard Gas & Electric Company* case the same District Court allowed an increase in compensation to noteholders on the basis of estimated improvement from $12,500,000 to $30,000,000 in the "current active market value" of the related portfolio stocks (63 F. Supp. 876, 877). If the Court of Appeals means that a District Court is entitled to reject

the valuation of the Commission because of a differing view as to the import of current money rates, such a conclusion is clearly in conflict with its conclusion that valuation is a problem for the Commission.

Previous Losses. The District Court's consideration of losses on divestment only scratched the surface, never recognized the complex elements involved, ignored the gains on other divestments and tax savings, the effect of purchases of preferred stocks out of proceeds of sales; it created an equity in favor of common stockholders on the basis of speculative assumptions. Even assuming it were possible to reconstruct such a synthetic enterprise, no one could ascertain its earning power. The Court did not evaluate this factor because it could not do so, but, nevertheless, something of value was charged to the preferred stockholders on this account.

While Engineers realized an important loss on the sale of its interest in Puget Sound Power & Light Co. in 1943-4, the Commission found that the sale strengthened the earnings of Engineers (R. 64a, 65a) and that the indications are that the carrying value on the books of Engineers was excessive and not that the sales price was low (R. 72a, n. 55). The fact is that the earnings of Puget Sound had fallen off substantially and by May, 1938, the dividend arrearages on preferred stock publicly held were approximately $12,500,000. Public power projects threatened its future. Then it was that Engineers' directors, anticipating a substantial loss in Puget Sound, established a reserve of $35,000,000 to provide for losses which they believed had accrued at that date in investments in subsidiaries, although such losses had not been taken (R. 1517a-1518a). When the total actual loss on Puget Sound ($33,320,519) became known in February, 1944, $29,297,000 of the loss was charged to the reserve created in 1938 for the purpose (R. 1608a). The Commission found these alleged losses to be an irrelevant factor, the strong implication being that the Engineers System was better off for the pruning.

Issue Prices. If net issue prices have any relevance, it could only be in the case of unseasoned securities, and the stocks in this case were seasoned. Nevertheless, the District Court used the net issue prices as a beginning point for valuation and decided to allow the preferred stockholders a bonus equal to the underwriting expenses and discount on issue as the net compensation for other factors, thereby arriving at the stated values and involuntary liquidating prices of $100 per share (R. 289a, 301a). Thus, the preferred stocks are "couriers with baggage" and the stockholders who acquired their preferred stocks after the initial seasoning inherited liabilities from years ago. Issue prices are certainly too remote to have any relevance.

Market History. The District Court holds that the market history affords affirmative support to the non-payment of premiums (R. 289a). The Commission considered the market history and the dividend record (R. 62a, n. 45). Again, while the District Court has the right to change its mind, we submit that the Court was on sounder ground when it held irrelevant the fact that the notes which were the center of controversy in the *Standard Gas & Electric* case (59 F. Supp. 274, 281) sold at discounts for long periods of time. It held that "market values (were) especially unreliable in (that) case because some of those engaged in buying and selling notes were of the view that such securities were under the cloud of the Act because they believed it created uncertainties." "A shrewd noteholder is only interested in the 'intrinsic value' behind his claim and in the amount of earnings coverage" (p. 281). Market history, of course, has a certain relevance in the valuation process, but to take something of present value away from the preferred stockholders on the strength of unrelated factors is inequitable.

Market Purchases of Preferred Stocks. The use which the District Court makes of the purchases of preferred

stocks is not evident beyond the fact that they are thrown into the hopper. The Court, as did the Commission, recognized that many factors affected the past history. Regarding purchases, the Court appears to be influenced by the fact that the Commission, in connection with past applications (1943-44) by Engineers for leave to acquire its preferred stocks, indicated that acquisitions at price levels slightly under the involuntary liquidation prices of $100 per share would not be unfair to the "security holders." The purpose of the Court's finding of facts in this respect (R. 303a, 304a) presumably is to suggest that it was not unfair in June, 1947 to limit the preferred stockholders to the involuntary liquidating prices, although the Commission in those earlier proceedings was dealing with open market purchases from stockholders who wished to sell and not with any valuation for the purposes of an equitable plan to be imposed upon all security holders. The evolution of the Commission's findings and views on this subject are to be found in its Findings and Opinions on the five successive applications of Engineers for permission to acquire blocks of its preferred stocks in the market for cash or by exchange, namely: 4 S. E. C. 615 (1939); 9 S. E. C. 84 (1941); 12 S. E. C. 804 (1943); 14 S. E. C. 237 (1943); and Holding Company Act Release, No. 4997 — S. E. C. — (1944). By February, 1942, the Commission perceived that piecemeal acquisitions of preferred stocks at a time when complete uncertainty existed as to management's policies, methods, and timing, in complying with Section 11 (b) created a potentiality for harm to preferred stockholders (12 S. E. C. 804, 813). The Commission stated that the major factors then present were absent in its 1939 and 1941 opinions (p. 810, n. 10); and that under the circumstances, it believed that at a minimum the "fair and equitable" standard requires a reasonable relation between the proposed acquisition prices and the treatment which might reasonably be accorded the preferreds under a comprehensive plan, which treatment, how-

ever, will depend on conditions existing at time the plan is approved (pp. 813-4). The Commission expressly noted Engineers' argument that even if compliance with Section 11 (b) results in a liquidation, the proper standard for the adjustment of rights of preferred stockholders is not the liquidation preference on involuntary liquidation or liquidation in bankruptcy but the fair value of their expectations in the absence of any such proceedings, taking into account their liquidation preferences as but one of many factors, and the Commission expressly refrained from answering the question pending a clearer basis for considering a purchase program. In the second 1943 opinion (14 S. E. C. 237, 244), the Commission said that as the amount receivable by the preferred stockholders in a purchase or exchange program tends to approach the maximum claim of the stock, the likelihood of unfairness is diminished, and approved an exchange program as fair and equitable at that time in the light of stated facts. Commissioner Healy dissented on the ground that re-acquisitions under the circumstances were involuntary reductions of capital and that the proceeds from the sale of assets should be applied pro rata to all preferred stockholders, but the majority of the Commission did not take that view (14 S. E. C. 237, 246; see also 12 S. E. C. 804, 816). In the 1944 opinion (Release No. 4997, p. 6) the Commission noted that the current market prices of the preferred stocks were close to the involuntary liquidation prices and stated that under the circumstances the proposed re-acquisition is not unfair to the security holders of Engineers. Engineers was free to utilize the money in other ways.

The Commission had come to realize that Engineers was in a position to take advantage of security prices far out of line by reason of uncertainties created by the management itself and found it necessary to impose some reasonable safeguards on the right of repurchase available to Engineers under the charter. The Commission only said that if was not unfair to security holders to permit Engi-

neers to make purchases at prevailing price levels which were then close to the involuntary liquidating preference. If a purchase program had been proposed under the circumstances existing after 1944 and were appropriate, presumably the Commission would have authorized purchases at prices not exceeding the voluntary redemption prices.

Retained Earnings. The retained earnings have been treated as if they represented a sacrifice on the part of the common stockholders, which was being unfairly used to the advantage of the preferred stockholders. The District Court found that as of June 30, 1945 the free earned surpluses were $2,773,000 for the subsidiaries and $7,095,000 for Engineers, a total of $9,868,000 or approximately $5 per share of common stock outstanding (R. 306a). The Commission found that Engineers' cash reserve of about $14,650,000 (estimated to be about $16,824,000 by the end of 1946) was accumulated from previous property dispositions and retained earnings; that instead of providing valuable leverage for the common stock, this cash reserve had become a financial burden; that companies in such a position ordinarily would call and redeem preferred stock; that Engineers' management pursued a policy of withholding dividends on common stock until satisfied that the system had made all the adjustments required under the Act (R. 59a-60a, 69a). The undisputed testimony is that retained earnings and proceeds of sales not reflected in the present cash reserves have been invested in the enterprise, or frozen in connection with purchases of other property or refunding operations, or used for purchases of preferred stocks (R. 306a). The use of earnings to help finance improvements and acquisitions of property is a normal and well-understood operation and one that was espoused by Engineers from the outset for the very purpose of strengthening the enterprise and improving the leverage of the common stock. The management felt from the beginning that it would be to the advantage of the stockholders to retire

the preferred stocks out of earnings. These policies inevitably improved the investment values of the surviving stocks (R. 921-922a; Annual Reports, Engs. Exs. No. 37A-37T inclusive, particularly pp. 1648-9a; 1691-2a, 1697a, 1714-5a, 1434a, 1444a, 1462a, 1481-2a; 1501a, 1517-8a, 1537a, 1552-4a, 1571-2a, 1588-89a, 1606a, 1612-3a, Int. R. 482a, 500a).

There is no evidence to sustain a contention that the management pursued an inequitable dividend policy and the Court attempts no such finding. There is considerable evidence that the management and the common stockholders were entirely satisfied with the policy of not distributing earnings for income tax reasons, particularly since the accumulation of earnings would be reflected in increased market prices (R. 98-9a, 920-1a). The Court merely argues that the distribution of those earnings would have reduced Dr. Badger's fair investment values, but it makes no attempt to show that such withdrawal would have reduced those investment values below the call prices. Furthermore, the Commission took the earned surpluses into consideration in valuing the rights of the common stockholders.

(c) Conclusion on Point 1.

Reverting to our starting point, we do not see wherein the Commission ignored or failed to weigh any relevant factors or was inconsistent in its approach or use of its scales and measures. The shares of preferred stocks which survived the purchasing program of the Company had, in June, 1947, an undisputed going concern or investment value equal to their call prices. The financial strength underlying the preferred stocks was reflected in the common stock, which was in a position to enjoy the full benefit of all appreciation, as contrasted to the preferred stocks, which were limited by their call features. We submit that the valuations of the Commission integrate all relevant factors and properly represent the equitable equivalents of the claims of the preferred stockholders as a matter of law, on the basis of the undisputed evidence and without

resort to any doctrine of administrative finality. In any event, we submit that the reasons advanced by the District Court for rejecting the valuation of the Commission are not sufficient to override its findings in the field of valuation since its findings are supported by substantial evidence and have rational foundation in law.

POINT 2.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT MAY REJECT VALUATIONS OF THE COMMISSION BASED ON CONSIDERATION OF ALL RELEVANT FACTORS AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

(a) The Statutory Duty and Stature of Findings of the Commission Under Section 11 (e) of the Act.

The Commission has the duty under Sections 11 (d) and 11 (e) of determining whether plans for compliance with Section 11 (b) are fair and equitable to the persons affected thereby. It also has the duty under Section 11 (f) of passing upon all reorganization plans for registered holding companies or subsidiaries thereof in proceedings in courts of the United States, whether under Section 11 or otherwise; and such plans may not become effective unless approved by the Commission after hearing prior to submission to the court. The phrasing of the three sections in this respect varies, but the import is the same.

Under Section 11 (e), the Commission has the further duty, *if requested by the company*,[6] to apply to a court in accordance with Section 18 (f) to enforce the plan, which the court must do if it finds the plan fair and equitable and appropriate to effectuate the provisions of Section 11. Section 11 (d) differs in this respect in that the aid of the court is necessarily invoked by the Commission to enforce its orders under Section 11 (b), and the court must find

[6] Italics supplied.

any plan for disposition of assets of the respondent company fair and equitable before using its enforcement powers.

It is desirable to note here that, while normally plans submitted under Section 11 (e) would not reach a circuit court of appeals except through enforcement proceedings in a district court under Section 18 (f) and appeal in accordance with Section 25, it is possible for a plan to reach the circuit court of appeals for review directly on appeal from the Commission under Section 24 (a). Section 24 (a) expressly provides that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive on appeal. There is nothing in the Act requiring court enforcement of a Section 11 (e) plan unless the company requests it, and such a plan may be approved by the Commission and consummated without court aid. If a plan does not provide for court enforcement or the company does not request the Commission to enforce the plan in a district court before the appeal period prescribed by Section 24 (a) has expired, an aggrieved person must take a timely appeal under Section 24 (a) to protect himself. Then, unless enforcement proceedings are subsequently taken and the circuit court sees fit to dismiss the appeal in deference to the procedure provided by Sections 11 (e) and 18 (f), the circuit court would have to determine the fairness of the plan. Such was the situation in *Phillips v. Securities and Exchange Commission*, 153 F. 2d 27 (C. A. 2, 1946), cert. denied 328 U. S. 860, where the Court of Appeals reviewed a plan of The United Corporation on direct appeal by a stockholder. The appellate court approved the plan as fair and equitable, holding that the conclusions of the Commission were justified under all the circumstances and well within the sphere of its peculiar competency.[7]

[7] For cases holding that appeals under Section 24 (a) are not proper where enforcement proceedings are pending in a district court or the plan provides for such proceedings, see *In re Securities and Exchange Commission* (*Otis & Co.*,

Since the quality of the Commission's findings of fact will not be affected by the course of the appeal and the need for expert findings is, presumably, no greater or less in the district courts than in the circuit courts of appeal, the reason for any difference in effect in the district court is not apparent. The express provision in Section 24 (a) was inserted to make certain that the established rule regarding findings of fact of administrative bodies applies in the circuit courts of appeal on direct appeals under Section 24 (a). Certainly it affords no valid basis for contending that the rule should be any different in the district courts.

While, therefore, both the Commission and the reviewing court have the duty of determining whether a plan is fair and equitable, their functions in this respect differ. Congress could not properly require a district court as a court of equity to lend its processes to enforce a plan which is unfair and inequitable, but, on the other hand, Congress recognized that the problems presented by such plans are complex and require a division of labor and special competence to evaluate the fairness of a plan in its several aspects.

What would be an appropriate division of labor between the Commission and a district court in Section 11 (e) proceedings? We venture to state it simply in the face of the volumes that have been written about the respective functions of administrative tribunals and courts.

The special competence of the Commission lies in comprehending the problems, investigating the facts, selecting facts according to their relevance and importance, evaluating facts, and reaching ultimate conclusions in accordance with applicable equitable principles. The Commission has the front line problem of discerning whether any fact or combination of facts invoke any special principles of law

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Intervenor), 142 F. 2d 411 (C. A. 3, 1944); *Okin v. Securities and Exchange Commission*, 145 F. 2d 206 (C. A. 2, 1944); *Lounsbury et al. v. Securities and Exchange Commission et al.*, 151 F. 2d 217 (C. A. 3, 1945).

or equitable considerations and then applying such principles and considerations with due weight and with regard for the inter-play of factors in complex situations, exercising its discretion where it has a choice. It has the duty of making an equitable valuation of the whole according to its judgment. Whatever this process is labeled, it is basically within the competence of the Commission and the function of the court in this instance should be defined with regard for the wide powers granted the Commission to do the job.

The special competence of the courts lies in determining whether applicable principles of law have been violated or disregarded by the Commission in the equitable evaluation of a plan and whether the facts found by the Commission are supported by substantial evidence. While Section 11 (e) gives the court the independent duty of determining whether plans are fair and equitable before lending its aid to enforcement, its function in this respect is necessarily circumscribed. In the division of labor Congress never intended that the court should reach over into the area reserved for the skills of the Commission and substitute its judgment for that of the Commission, provided the Commission's findings and conclusions have a rational basis in fact. A problem of attitudes is involved; the function of the court is invested with the attitude which it should have toward the findings and conclusions of the Commission in its field. There are many definitions of proper attitudes of courts toward findings of administrative bodies or agencies. They range from the most liberal to the skittish, depending, perhaps, upon the field of activity and the particular type of administrative unit involved. However that may be, we are here concerned with the proper attitude of the court in relation to the findings of an expert commission operating in a highly specialized economic field.

The Court of Appeals for the Third Circuit had occasion to consider this question in *In re Standard Gas &*

Electric Co., 151 F. 2d 326 (C. A. 3, 1945), wherein the District Court had overruled the decision of the Commission approving payment of notes partly by exchange of portfolio stocks. The immediate question was whether payment in property rather than cash was fair and equitable. The Court of Appeals commented as follows (p. 331):

> "It can be set out as a well established rule of administrative law that the action of an expert administrative body in determining the particular remedial measures demanded in an individual case is not to be overturned by court action unless the administrative body has lost sight of the law. The more technical the subject matter before the administrative tribunal, the more reluctant the court should be, we think, in disagreeing with it on a matter which is a question of judgment. The subject matter of this Act is highly technical. It seems to us that it is unlikely that Congress, in vesting authority to handle reorganizations of great public utility empires under the statute, would give the expert less power than bodies for easier and less complicated pieces of work unquestionably have. In other words, we think the wide grant of power given by Congress to the Commission carries with it the authority to the Commission to fix the form of reorganizations, subject to court control if the Commission departs from the law. We do not think that the District Court or appellate court is to substitute its notion of practical expediency for that of the Commission."

The foregoing appears to be the minimum of reluctance applicable here. Other cases hold that a finding by the Commission that a plan is fair and equitable cannot be upset by the court unless it is shown to be without rational basis in fact or predicated on a clear-cut error of law. *Massachusetts Mutual Life Insurance Co. v. Securities and Exchange Commission*, 151 F. 2d 424, 430 (C. A. 8, 1945);

Lahti v. New England Power Ass'n., 160 F. 2d 845, 850 (C. A. 1, 1947); *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, at 112-3.

While this Court was not passing on the powers and duties of a Section 11 (e) court in the second Chenery case, *Securities and Exchange Commission v. Chenery Corp.*, 332 U. S. 194, the matters under consideration expressly related back to the application of the "fair and equitable" standards of Section 11 (e) and the standards of "what is detrimental to the public interest or the interest of investors or consumers" under Section 7 (d) (6) and 7 (e). The case had gone to the Court of Appeals on direct appeal from the Commission under Section 24 (a) of the Act. This Court did not expressly allude in its opinion to the provisions of Section 24 (a) regarding the binding effect of the findings of the Commission as to the facts, if supported by substantial evidence. In general terms this Court held that the very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in the matters under consideration. The Court hold that its duty was at an end when it became evident that the Commission's action was based upon substantial evidence and was consistent with the authority granted by Congress; that the facts being undisputed, it was free to disturb the Commission's conclusion only if it lacked rational and statutory foundation (pp. 207, 208).

(b) The Statutory Duty and Powers of the District Court Under Section 11 (e) of the Act.

Section 11 (e) of the Act authorizes the Commission, at the request of a company, to apply to a district court in accordance with Section 18 (f) to enforce and carry out the terms and provisions of the plan. If upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and appropriate to effectuate the provisions of Section 11, the court

as a court of equity may take exclusive jurisdiction and possession of the company and the assets.

The Court of Appeals interpreted this to mean that a Section 1, (e) court must exercise its full and independent judgment as to the fairness and equity of a plan (R. 33). "The judicial process is brigaded with the administrative process of the Commission, but this does not mean that the (district) court in the field allocated to it by Congress is not to exercise its independent plenary judgment as an equity reorganization tribunal upon every matter relating to the fairness and equity of the reorganization. . . . It was the duty of the (district court) to function as an equity reorganization tribunal within the limitations prescribed by the Act" (R. 34). "Any question which goes to the issue of what is fair and equitable may be raised and must be passed upon" (R. 32). The district court may not act capriciously or substitute its valuations for those of the Commission, but, in the performance of its statutory duty, it may reject valuations made by the Commission (R. 34).

In reaching this conclusion the Court of Appeals relied on what it conceived to be the role of a district court in proceedings under Chapter X and Section 77 of the Bankruptcy Act, citations from the legislative history of the Holding Company Act, and the traditional role of an equity reorganization tribunal. It is frequently easy to find in legislative debates statements which seem to support a particular interpretation of proposed statutory language. Also, it is easy to fall into error when the debates have been prolonged and voluminous as they were in the case of the adoption of the Holding Company Act. The Commission in its brief has thoroughly covered the subject and we believe fully demonstrated wherein the Court of Appeals erred in these three respects. We will not attempt here to cover the ground again and will confine our effort to a supplementary observation.

At the time of the adoption of the Holding Company Act in 1935 the substantial evidence rule was firmly estab-

lished in law, and it is reasonable to suppose that the proponents of the Act had it in mind. It is unreasonable to suppose that they intended to brigade the administrative and judicial processes in such a way as to give the court a veto power in all areas or sterilize the special competence of the Commission. Normally the respective roles of the administrative tribunal and court are independent, but, nevertheless complementary. These principles are recognized in the decisions of this Court respecting reorganization proceedings under Section 77 of the Bankruptcy Act and roles of the Interstate Commerce Commission and the courts thereunder. See *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448; *Group of Investors v. Milwaukee R. Co.*, 318 U. S. 523; *Old Colony Boudholders, et al. v. N. Y. N. H. & H. R. Co.*, 161 F 2d 413 (C A. 2, 194.). We submit that in 1935 the substantial evidence rule had beconie a normal incident to statutory designs such as the Holding Company Act and that application of the rule should be denied only upon the clearest mandate. There is no such mandate in that Act.

As a corollary, it is the Commission and not the Court which should be given the benefit of any doubt in resolving questions of techniques, relevance, feasibility, weight and emphasis. Suppose a case where neither the Court nor the Commission was "clearly erroneous" in its conclusions in such areas. Which tribunal should prevail? Suppose consideration of losses were relevant and feasible and there is evidence warranting a finding by the Commission that a particular loss was irrelevant as in the case of the Puget Sound loss. Should the Court prevail because its discretion might reasonably lead to the opposite conclusion? Seldom will one find complete concurrence in such complex problems. From time to time the Commission would have to appease reasonable doubts of a considerable number of judicial minds, and every objector will have two chances, two days in court on the same level. The Commission

would never know where it stood until the last doubt were resolved.

(c) Assuming That the Involuntary Liquidation Preference in the Charter Is Not Controlling as a Matter of Law, the Findings of the Commission Are Binding on the District Court.

This, we think, is self-evident. There is substantial evidence to support the findings. Insofar as the considerations of the District Court have any relevance to valuation, they have been considered and weighed. Under these circumstances the Court of Appeals would be bound by the findings of the Commission had the case gone to it on direct appeal under Section 24 (a) of the Act and we submit that in this case "respect" for the findings of the Commission means acceptance by the District Court.

CONCLUSION.

The Court of Appeals should be reversed, and the District Court should be directed to approve and enforce the plan as approved by the Commission and in accordance with the escrow agreement.

Respectfully submitted,

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December 22, 1948.

APPENDIX.

Section 11 (d), (e) and (f) of the Public Utility Holding Company Act of 1935 (15 U. S. C. § 79k (d), (e) and (f) provides as follows:

"(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this chapter, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b) the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

"(f) In any proceeding in a court of the United States, whether under this section or otherwise, in

which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order, as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission."

Section 18 (f) of said Act (15 U. S. C. § 79r (f)) provides as follows:

"(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this chapter."

Section 24 (a) of the same Act (15 U. S. C. § 79x) provides as follows:

"Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commisison be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the

Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. *The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.*[1] If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. *The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive,*[2] and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

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[1] Italics supplied.

[2] Italics supplied.

Section 77 (e) of the Bankruptcy Act (11 U. S. C. § 205 (e)) provides as follows:

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securi-

ties provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such

class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtors' estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf

of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further*, That if in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not con-

firm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."